

Vulnerable Defendant: Barriers to effective communication between the defendant and the court.

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INTRODUCTION:

It has been widely accepted for a long time that the majority of criminal justice systems have not treated crime victims and witnesses fairly. Most common law jurisdictions have passed distinctive procedural and evidence law reforms, particularly with regard to vulnerable witnesses, in an effort to address this issue. This entails removing the witness from the defendant's line of sight, forbidding the defendant from asking the witness questions during his or her deposition, minimising unfair cross-examination, and eliminating testimony about the witness's past sexual activities. These efforts will all require more funding. Only the processes and impartial hearings are essential components of our judicial system. Such components must be accessible to parties who, due to a mental or physical disability/disorder, impairment of intellectual or social functioning, fear or distress, or any combination of these are vulnerable in such a way that their ability to participate in proceedings is jeopardised. More than 20 years ago, worries concerning vulnerable witnesses in criminal trials were a major issue. A framework for offering necessary support and protection was established by the Youth and Criminal Justice Act of 1999. This framework is still in use and frequently referred to in criminal courts. Nonetheless, the problem of weak defendants still persists and has not yet been solved.

This article will attempt to establish the oppositional impediments to successful communication between the defendant and the court in order to stay on topic. The purpose of this essay is to respond to the following queries: 1. Why should defendants be allowed to participate in criminal procedures in a meaningful way?

2. Why has it been so difficult to get defendants to participate meaningfully?

VULNERABLE DEFENDANT

In the magistrates' courts, mentally challenged defendants who struggle to fully engage in their trials are not afforded the same protection as those facing charges in the Crown Court. The Rule Commission for England and Wales recognised this gap and recommended that the law governing effective participation be applied equally in magistrates' courts. When you look at the legislation, the legal aid system, and the viewpoints of legal professionals on the 'front lines,' it's evident that policy changes are more important than legal reform and are more likely to address the needs of these vulnerable people. The purpose of this paper is to show that legal reform will not be enough to adequately protect mentally ill defendants.¹

In the case of *O'Donnell v United Kingdom* [2015], The court decided to dismiss the application since no infringement of Article 6 had occurred. There had been no unfairness in the adverse inference instruction when all the circumstances of the case were considered, including the weight of the circumstantial evidence against O'Donnell, the competing medical evidence, and the trial judge's explicit and precise jury instructions. In terms of the second point, at the time of the trial in Northern Ireland, the judge was not compelled to instruct the jury that no inferences should be drawn unless there was a case to answer. Taking into account the overwhelming circumstantial evidence against O'Donnell² as well as the trial judge's meticulous jury instructions, Article 6 has not been violated in respect of the trial judge's failure to give a direction on a case to answer.² In *R v Anthony Cox 2012* The Court of Appeal reaffirmed that exceptional measures for vulnerable defendants are still entirely up to the trial judge's discretion. The fact that an intermediate could not be found to assist the appellant, who had serious psychiatric challenges, was deemed not to make his conviction for rape unsafe because the trial process had been significantly changed to enable him to successfully engage in the trial process³. Courts have taken steps to accommodate vulnerable defendants since the trial of Venables and Thompson, in which two youngsters were tried in an adult court for the murder of James Bulger. A road map for strengthening procedural rights of suspect in criminal proceedings was endorsed by the Council of Europe in 2009, recognising, that the right to a fair trial is fundamental.⁴

To establish this new national service, the service will collaborate closely with the government and the NCA. Witness protection is critical in combating organised crime and obtaining convictions in a variety of the most serious and violent crimes. Protected person services are currently inconsistent, varied, and lack uniform delivery standards. Last year, slightly over one-quarter of all failed prosecutions (27%) were due to witness or victim unwillingness to testify. In 2009/10, 18% of witnesses who testified in court said they or their families were intimidated at some time, and 40% said they were worried about coming into contact with the defendant and their supporters.⁵

¹ Effective Participation of Mentally Vulnerable Defendants in the Magistrates' Courts in England and Wales—The 'Front Line' from a Legal Perspective, Helen Howard.

² *O'Donnell v United Kingdom* [2015] ECHR 16667/10

³ *R v Anthony Cox* [2012] EWCA Crim 549

⁴ James bulger murder

⁵ Franklyn (2012), Satisfaction and willingness to engage with the Criminal Justice System. Data from the Witness and Victims Experience Survey (WAVES) 2009/10

Protecting the fair trial rights of vulnerable defendants in criminal proceedings

The 2009 Procedural Roadmap for enhancing the procedural rights of suspected or accused individuals in criminal proceedings was supported by the European Union Council under the Lisbon Treaty. So far, the Roadmap has yielded six initiatives, each of which has resulted in the adoption or negotiation of particular procedural minimum criteria. Only Measure E directly addresses the issue of vulnerable people so far. A provisional result for this Measure has just been produced by a Commission Recommendation on procedural safeguards for vulnerable persons in criminal proceedings. The purpose of this contribution is to discuss the need for Europe to adopt binding minimum standards to provide additional protection for mentally ill defendants⁶. In 2003, the European Commission advised that throughout the early phases of criminal proceedings, member state authorities assess a defendant's possible vulnerability and take relevant measures to ensure justice.⁷ After more than a decade, the Commission appears to be ready to embark on a mission to ensure that vulnerable defendants in Europe receive adequate procedural protection by enacting basic protection criteria. Because it is an essentially non-binding advice, the weapon of choice newly selected for this matter may appear to be a dud⁸. Nonetheless, it is a legitimate EU device with significant clout when it comes to the protection of vulnerable defendants.

In the vast majority of situations, the police will determine whether a witness is afraid and should notify the prosecution. Ideally, the police and the prosecutor will have a discussion regarding the type of 'protection' that should be sought during the pre-charge stage. Information concerning a witness's fear may occasionally come from a different source (for example the Witness Care Unit or the Witness Service). When prosecutors learn that a witness is afraid to testify, they must work closely with the police to evaluate the various options available to them, both at common law and by statute.

Prosecutors should make every effort to alleviate the witness's anxiety and provide them with the necessary protection. Prosecutors must also ensure that the witness's rights under the European Convention on Human Rights are recognised and respected. The Youth Justice and Criminal Evidence Act of 1999 (YJCEA) specifies a number of options for witnesses in criminal cases who are judged 'intimidated.' Screening the witness from the accused; live testimony; evidence provided in secret are some of the particular steps that may be essential for intimidated witnesses⁹.

The Criminal Procedure Rules 2013 (CrimPR) require that "criminal matters be treated with justly," which is accomplished by "acting equally with the prosecution and defence," recognising the defendant's right to a fair trial while also respecting the interests of witnesses, victims, and jurors¹⁰. The basis of this article is that a fair trial does not entail an abstract balance of the defendant's and complainant's rights claims¹¹. In a zero-sum game, measures to safeguard one do not always detract from the rights of the other. Both the defence and the prosecution have the right to contest a witness' testimony, but only under the most favourable conditions for eliciting the truth, in a process based on equal footing and effective participation. This is entirely consistent with the entitlement of all vulnerable participants, including the defendant, to protection from (further) trauma, in the overriding interests of securing justice

Youth justice and criminal evidence act of 1999

Section 16 of the Youth Justice and Criminal Evidence Act 1999, as amended by the Coroners and Justice Act 2009, defines a vulnerable witness as: Under the age of eighteen Suffering from a mental disorder as defined by the Mental Health Act 1983, or having a major impairment of cognitive and social functioning in any other way, or having a physical disability or suffering from a bodily disorder. Vulnerable defendants may share comparable flaws that limit their ability to participate in a crown court trial. Here are several examples:

- Vulnerable adult: 43-year-old man suspected of prior sexual offences against his cousin sister, who has a low IQ and serious anxiety disorders. He denies that anything happened. Her friend remembered that he came at night when she was staying over when he was 16 and she was 11.

Section 17 of the YJCEA addresses intimidated witnesses, stating that extraordinary measures may be taken if the quality of evidence supplied by a witness is likely to be harmed as a result of the witness's anxiety or discomfort while testifying in the proceedings. A variety of considerations must be considered by the court before making this decision¹². Section 17 automatically qualifies witnesses to certain gun and knife crime offences for special measures. If a witness qualifies as an intimidated witness, special measures are not accessible by default. Before making a decision on a prosecutor's application on behalf of an eligible witness, the court must consider a variety of issues. These variables are predetermined in Section 19 of the YJCEA¹³.

⁶ Lisbon Reform Treaty in 2009.

⁷ European Commission, 2003

⁸ European Commission, 2013b

⁹ Youth Justice and Criminal Evidence Act 1999, Section 19

¹⁰ Criminal Procedure Rules 2013 (SI 2013/1554) (CrimPR 2013) r.1.1.

¹¹ L. Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] Crim. L.R. 4; L. Hoyano, "Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?" [2001] Crim. L.R. 948

¹² Youth Justice and Criminal Evidence Act 1999, Section 17

¹³ Youth Justice and Criminal Evidence Act 1999, Section 19

Section 46 of the YJCEA allows courts to issue a reporting direction in the case of adult witnesses, prohibiting any matter relating to the witness from publishing during the witness's lifetime if it is likely to lead] the public to identify the individual as a witness in a particular criminal proceedings. The power under section 46 can only be used if the prosecution makes an application (or defence¹⁴). To determine whether a witness is eligible for this protection, the court must apply a two-stage test, similar to that used to determine whether an adult is eligible for special measures under section 16 or section 17 of the YJCEA: is the witness eligible for protection; and is a reporting direction likely to improve the quality of the witness's evidence?¹⁵

CONCLUSION:

To answer the questions raised in the introduction, Why should defendants have the right and be able to effectively engage in criminal proceedings? 2. Why has it been so difficult to get defendants to participate meaningfully? Many defendants have a needs support in one way or the other that, if unmet, can impede their ability to participate effectively in court trails and jeopardising their right to a fair trial as given to them by Article 6 of the European Convention on Human Rights. The current provisions in the United Kingdom for special measures to ensure adequate support to vulnerable defendants and witnesses are inequitable. Vulnerable witnesses have facility to access the support, such as an intermediary, under the law; however, vulnerable defendants do not, and must rely on the court's discretion and the common law. Intermediaries for defendants are not registered or controlled, despite the fact that intermediaries for vulnerable witnesses are registered and subject to a rigorous screening, training, and accreditation process. Intermediaries should be included in the statutory provisions for vulnerable defendants' special measures. These special measures, along with other reasonable adjustments, should be available on each case so as to provide protection to fair-trial of the vulnerable defendant to participate effectively in court proceedings, assist in their preparation for the trial process, and help ensure fitness to appeal and be a part of proceedings.¹⁶

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¹⁴ Youth Justice and Criminal Evidence Act 1999, Section 46

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